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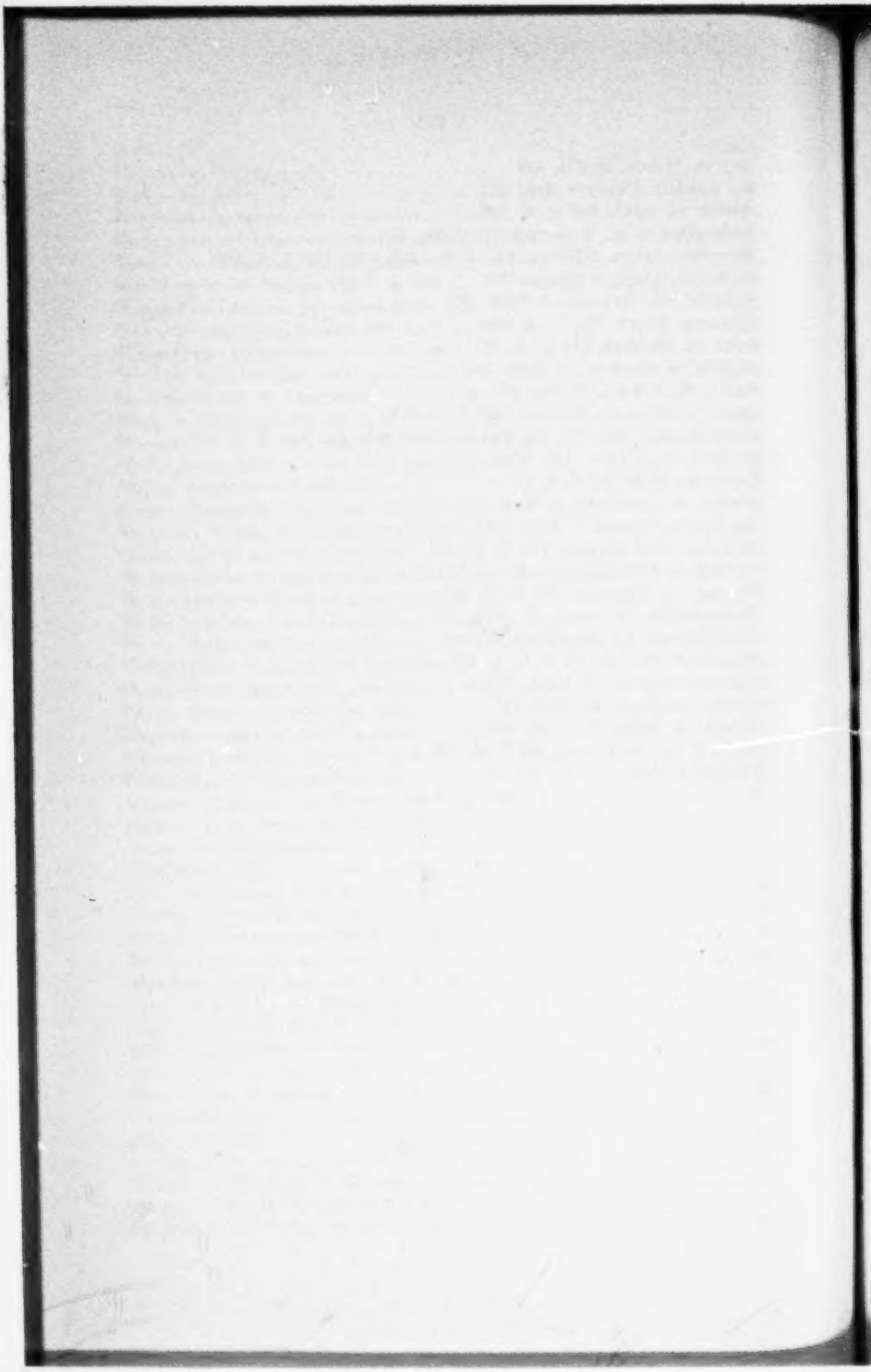

In the Supreme Court of the United States

JOSEPH HULL, et al.,
Appellants,
vs.
ARTHUR E. BURR, et al., as Trustees, Etc.,
Appellees.

No. 767

BRIEF FOR APPELLANTS.

On pages 1 to 3 of Appellants' Brief on Motion to Dismiss is a statement of facts on which appellants rely for relief. On pages 3 and 4 is a statement of the claim of appellees and how it arises. On pages 4 and 5 is a statement of facts showing the claim of the defendants is *unfounded in fact and law.* The Court is referred to those pages of the brief for a statement of the facts and to pages 5 to 9 of the record for a more detailed statement of facts, instead of repeating them here.

Case Below Disposed of on Demurrer.

Appellees, defendants here, demurred to the Bill on sixteen specified grounds. (Rec. 2 to 4). This demurrer was sustained by the District Court that rendered a decree dismissing the Bill with costs, without any qualification that it should be without prejudice.

The Court of Appeals by its decree affirmed the decree of the District Court with costs.

Merits Not Denied.

Neither the trial or appellate court denied that the Bill states a perfect cause for a decree quieting title of

the plaintiffs. On the contrary they both conceded that a perfect cause of action was stated in the bill, even were defendants possessed of the character of trustees, but dismissed the bill on the ground that appellants, called the plaintiffs, can obtain full relief by setting up the facts contained in the present bill in an answer to a suit pending in the State Court of Florida.

The appellate court further ruled in effect that section 720 of the Revised Statutes and the rule of judicial comity prohibited the granting of any relief in a Federal Court, on the ground that granting such relief would enjoin proceedings pending in the State Court of Florida. See opinion of the District Court, pages 27, especially marginal page 40. See opinion of Appellate Court pages 37 and 38 by Judge Putnam. See his opinion on petition for a rehearing, pages 42, 43.

This appeal is prosecuted to reverse those decrees.

Argument on Assignments of Error.

There is but one assignment of error upon the judgment of the Court of Appeals. That is for affirming the decree of the District Court. But this assignment is followed by nine specifications of errors, Nos. 2 to 10 inclusive. Rec. 46-48.

The second specification is on the ground that the Appellate Court erred in holding that the Federal Court was prohibited by Section 720 R. S. *from granting the decree specially prayed.* Rec. 46. This special prayer was for a decree embracing an injunction clause *enjoining the defendants as trustees "from asserting in any Court or place any right, title or interest"* in any of the said properties. See page 17, quoted in opinion of Judge Putnam, page 38.

The third specification of error is that "said Court of Appeals erred in ignoring the prayer in the bill for general relief under which a final and effective decree for complainants can be rendered, without directly or indirectly enjoining the defendants from prosecuting in the

State Court of Florida any suit *pending therein when the present suit was brought''* to which defendants were parties.

The fourth specification is that said Court of Appeals in its opinion states as follows, to-wit: "So far as the litigation is concerned, the questions in the Florida Court *are or may be exactly the same as we have here.''*

The above second, third and fourth specifications can be conveniently argued and considered together.

SECOND, THIRD AND FOURTH SPECIFICATIONS.

It is manifest from Judge Putnam's opinion that he assumed there was a suit pending in a Florida Court *between the same parties,* (they being reversed) to this bill, and that a decree quieting title, containing the injunction clause specially prayed, would violate Section 720 R. S. and the rule of judicial comity which he states in his opinion on rehearing, page 42.

If the above assumption of the learned Judge is not supported *by the record,* his conclusion is erroneous.

No Such Suit as Assumed by the Court Was Pending in the State Court Between the Same Parties When the Present Suit Was Brought.

The demurrer admitted the averments in the bill in respect to the pendency of a suit in the State Court. The eleventh and twelfth sections of the bill, Rec. pages 8 and 9, clearly state what suit was pending in the State Court. Upon those averments, Burr as sole trustee, brought a bill in equity on March 26, 1908 against the present appellants in the State Court of Florida to establish an alleged interest in the properties in question; Burr resigned as trustee under his appointment December 27, 1905 and his resignation was accepted on *March 12, 1909, and subsequently* Burr, Simpson and Edwards, claiming to have been appointed trustees as successors to Burr after his resignation, did on the 9th day of January 1912, (nearly

three years after their alleged appointment) *file a supplemental bill in said State Court to revive Burr's bill that abated,* (in the equity sense of the term) on his resignation.

This present bill, page 9, avers that Burr's bill had not been *prosecuted to issues of fact* before he resigned, and that issues of fact have been joined by answer and replication to said supplemental bill, and "that said issues have not been tried" and there has been "no decree making defendants (plaintiffs there) as trustees complainants" to Burr's bill.

Now upon these facts admitted by demurrer, Burr's bill *had abated* in the equity sense and in Hull vs. Burr, 62 Fla. 499, 502, 503, 504 the Florida Court held that Burr's bill had so far abated that *"no further proceedings"* could be had on it until Burr's successors had been made parties. After that decision the appellees here filed said supplemental bill, and the question of abatement in a State Court is one of local law. Martin vs. B. & O. R. R. Co., 151 U. S. 673.

Certainly it is true in law that the decree specially prayed for containing the injunction clause would not have enjoined the defendants here from prosecuting *Burr's bill* in the State Court, for they were not parties to Burr's bill and the State Court had held that Burr's bill *could not be further prosecuted* until new parties plaintiff had been made to it. And appellants' bill in the court below not only avers that no new parties had been made to Burr's bill, but *that it still stood abated,* when the present bill was filed. See Rec. page 9.

Judge Putnam states that the *"questions in the Florida Court are or may be exactly the same as we have here."* Rec. p. 38. The Court was bound by the averments of the present bill that Burr's bill was not at issue therefore no issue or question of fact involving the 440 acres of land *had been raised at all in the State Court.*

The words *"or may be exactly the same as we have here"* in the Judge's opinion, are *obviously based on the assumption that* Burr's bill *may be revived in the State*

Court, and if it is then the appellants here by answer to Burr's bill can set up the same state of facts that are stated in the present bill, and have them litigated *in the State Court.* Indeed, Judge Dodge expressly says: "the plaintiffs therefore have only to prove in the suit pending in Florida that their interests are as they alleged exclusive of any other, so that the bankrupt could have had no interest in the properties, *and they have finally disposed of the trustees' claim.*"

The Argument.

The argument of both courts below, as shown by their opinions is that as Burr's bill *may be revived; and if it is, appellants can then by an answer thereto have the same questions litigated in the State Court that they seek to have litigated by their present bill* in the Federal Court.

It must be conceded that appellants could not answer Burr's bill and put it at issue until it is revived, because until then there is no plaintiff therein to answer. And as shown the Florida Court has decided no answer can be filed until the suit is revived.

At best the argument of the courts below is that inasmuch as appellants may have in the event Burr's bill is revived, an opportunity to have litigated in the State Court the same questions they pray to have litigated in the Federal Court below, they must be precluded from resorting to the Federal Court at all. Whereas the principal is well settled that the pendency of a suit in the State Court is no bar to a suit in the Federal Court even between the same parties, *as to any questions of fact or law that have not been foreclosed in the suit in the State Court by final adjudication.* And the litigant has a constitutional right to resort to a Federal Court otherwise having jurisdiction.

Burgess vs. Seligman, 107 U. S. 21, text 34.
Chicott Co. vs. Sherwood, 148 U. S. 529.
McClellan vs. Carland, 217 U. S. 269-282.

D. L. Sons vs. A. Club of America, 225 U. S. 489. text 500.
B. & M. R. R. Co. vs. Gokey, 210 U. S. 155, text 162.

Errors of Court Below.

The Appellate Court said that the questions raised in the present bill "may be raised in the State court." We suppose that suggestion is based on the assumption that Burr's bill may be revived and if it is then the appellants can by an answer thereto raise all the questions raised by their present bill, and then the State court will have jurisdiction thereof. That is an erroneous view. There must be a suit pending in the State court between the same parties raising the same questions and for like relief *when* the Federal suit is filed, or Section 720 does not apply. This is self evident.

Watson vs. Jones, 13 Wall. 717-718.
Pendleton vs. Russell, 144 U. S. 645 to 647.
Moran vs. Sturgis, 154 U. S. 279.
Buck vs. Colbath, 3 Wall., 335, Syl. No. 9, text 345.
Hunt vs. N. Y. Cotton Exchange, 205 U. S. 323-339.

Upon the averments in Section 12 of the bill it is shown that the only suit that was pending in the State Court was the suit to revive Burr's bill and the only possible issue of fact in that suit is whether appellees possess the character of trustees.

It is impossible for appellants in answer to the suit to revive to raise the questions raised in the present bill.

But Burr's suit may never be revived; that will depend upon the judgment of this court on writ of error to the State Court should the latter decree a revivor.

It is very clear that a Federal Court cannot abdicate and decline to exercise its jurisdiction of a case before it simply on the ground that the same question may be raised in future in a State Court between the same parties.

A litigant cannot be turned out of the Federal Court on any such ground as that.

Appellants at least were entitled to proceed in the court below until it could be shown that Burr's bill had been revived. It will be time enough to consider the effect of a decree reviving Burr's bill when it is obtained, and the court below should have considered that if the facts stated in the present bill are true such a decree of revivor never can be obtained.

In Fisk vs. U. P. R. R. Co., 10 Blatchford, 518, the court held that Section 720 did not apply to suits not pending in the State Court when the Federal suit was begun.

In Live Stock Association vs. Crescent City, etc., Vol. 1 Abbott's U. S. Repts., 388, text 406, Justice Bradley discussed Section 720 and granted a decree under the prayer for general relief which contained an injunction "restraining defendants from commencing or prosecuting any other suit * * * than such as are now pending against the said plaintiffs." Id., 406-407.

In Watson vs. Jones, 13 Wall., 679, text 715-716, the court said in order to defeat a second suit: "The identity of the parties to the case made and of the relief sought should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication." "* * This relief must be founded on the same facts." Id. 715.

Under the prayer for general relief in that case p. 720, the court decreed substantial relief. See decree p. 699, affirmed p. 735.

It is also true that if appellees should fail to revive Burr's abated suit, they can bring a new suit unless it should be adjudged that they are not trustees, but the fact that they may bring such new suit does not make Section 720 applicable. A decree of revivor would in respect to time put appellees in court as parties to Burr's suit, the same as if they had brought a new suit as of the date of such decree of revivor and Section 720 does not apply.

Section 720 does not apply so as to prohibit the Federal Court in order to protect plaintiff's rights under

Federal judgment, from enjoining proceedings in the State Court, commenced long subsequent to said judgment.

Riverdale Cotton Mills vs. Ala. & Ga. Mfg. Company, 198 U. S., 196-197, Shields vs. Thomas, 18 How. 262-263.
French Trustees vs. Hay, 22 Wall. 250, 257.

THE FEDERAL JUDGMENT IN EJECTMENT AND ITS EFFECT.

In the case of Shields vs. Thomas, 18 Howard, 253, text 262, it was expressly ruled that a bill in chancery is an appropriate mode of obtaining the benefit of a decree or judgment of another court. On page 262 this Court said "Amongst the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same, *or of a different court as the exigencies of the case or the interests of the parties may require.* Story's Eq. Pl., 429, 430, 431 upon the authority of Milford's Eq. Pl., 95, and of Cooper's Eq. Pl., 98-99." And the same is ruled in French Trustees vs. Hay, 22 Wall. 250, 251, and in Riverdale Cotton Mills vs. Ala. & Ga. Mfg. Co., 198, U. S. 188, text 196, where it was expressly ruled that a Federal Court could "restrain the action in the State Court in order to protect the title it had conveyed by the foreclosure proceedings, citing Julian vs. Central Trust Co., 193 U. S. 93-112." And further said, p. 196 of 198 U. S. supra: "In such cases where the Federal Court *acts in aid of its own jurisdiction and to render its decree effectual* it may notwithstanding Section 720 Rev. Stats. restrain all proceedings in a State Court which would have the effect of defeating or impairing its jurisdiction."

And by a parity of reasoning the Federal Court in Massachusetts in aid of giving due force and effect to the said Federal judgment in Florida under which plaintiffs claim protection from attack on their title, can enjoin the defendants as trustees from setting up any title as against the said judgment.

This judgment of the Federal Court is of vital value to appellants, and the defendants' assertions of rights in the 440 acres of land thereby adjudicated to be the property of Hull are in contempt and disregard of that judgment.

One of the objects of the present bill is *to secure to the appellant the Prairie Pebble Phosphate Company the benefit of that Federal judgment in ejectment*, recovered on March 13, 1906 against the Port Tampa Phosphate Company under which defendants as trustees claim. That judgment adjudged that Hull, the said Pebble Company's grantor, was the owner of the fee simple title to the 440 acres of land, and was entitled to the possession thereof. See that judgment, Rec. 26. As the defendants, appellees here, are citizens of Massachusetts personal service of process could not have been made on them on a bill filed in the Federal Court in Florida, and in such cases personal service is indispensable, and appellants were compelled to resort to the court below as the only Federal Court that could obtain jurisdiction over the persons of the appellees, and by its decree give effect to that judgment.

Beyond doubt this court must give to the Federal judgment in ejectment the same force and effect it would have had had it been rendered in a Florida Court.

Hancock Natl. Bank vs. Farnum, 176 U. S. 640, test 645.

And it cannot be doubted that fictitious parties in Florida have been abolished and that *one judgment in ejectment* against the defendant concludes him and all persons claiming under him subsequent to suit brought in which the judgment was rendered. See Gen. Stats. of Fla., Sections 1966 to 1970 inclusive.

This Court has repeatedly ruled that where the common law fictitious parties have been abolished one judgment concludes the parties and all persons claiming under them.

Sturdy vs. Jackaway, 4 Wall. 174, text 176.
Barrows vs. Kindred 4, Wall 399.

No provision is made in the Florida Statute for a second trial.

The facts alleged in the first ten sections of the bill show a perfect and absolute title in the appellant the Pebble Company, fortified by the judgment in ejectment and the resolution of the Port Tampa Company, the alleged bankrupt, under which it sold all its asserted interest to Hull, the Pebble Company's grantor. *These facts being admitted by the demurrer* it follows that it was legally impossible that on the 8th day of November A. D. 1905, when the petition in bankruptcy was filed, that the said Port Tampa Company could have owned any interest in said properties which it could have transferred, or which could have been levied upon and sold under judicial process against the bankrupt under section 70a of the Act of 1898. See Thomas vs. Taggart, 209 U. S. 385, text 389; Hewit vs. B. M. Works, 194 U. S. 296; Low vs. Welch, 139 Mass. 33.

Not Before the Court.

We repeat that upon the averments in the bill admitted by demurrer, the question whether the Port Tampa Company could have possibly still owned some interest in these properties and was not concluded by the said judgment and resolution *is not now before this court.* That question can only arise by an answer assailing the said judgment as not conclusive, and assailing the resolution of the Port Tampa Company and showing it is invalid.

Ignoring Facts Admitted by Demurrer. Caution.

We direct attention to the fact that in opposing counsel's brief in support of their motion to dismiss or affirm, they *in important particulars utterly ignore* that the facts stated in the bill are admitted by demurrer, and base their arguments on facts they assume contradicted by the record of this cause.

Opinion on Rehearing.

In the petition for rehearing, Rec. 39 to 41, second paragraph it was suggested that under *the prayer for general relief* the District Court could have rendered an effective decree quieting the appellants' title and removing the cloud without any injunction clause therein specially prayed for. Strange to say the Court of Appeals did not deny that proposition but dismissed it on the ground that counsel in the courts below *had not specially asked for such a decree.* See Opinion p. 48.

We think it indisputable that it is the duty of a court of equity to overrule a demurrer to a bill, if upon the case made by it the court can award any substantial relief under the prayer for general relief, even though in argument counsel have insisted on the special relief prayed.

Necessarily, counsel in argument of the demurrer was not undertaking to settle the form of a decree on the merits; he was contending the demurrer should be overruled. The settlement of the form of a decree comes later on.

If authority is needed we have abundantly shown by cases cited supra that the court erred in holding no relief could be granted under the general prayer, because it was not asked for in argument. It is even the duty of the wise chancellor to protect the client against remediable mistakes of his solicitor.

Trustees Not Parties to the Federal Judgment.

It may be contended that the Federal judgment in ejectment against the Port Tampa Company, the alleged bankrupt, does not conclude the defendants as trustees because neither they or Burr as sole trustee under his appointment December 27, 1905, *were parties* to the said judgment.

Let us here fix the important dates: The Petition in Bankruptcy was filed *November 8, 1905;* the asserted adjudication was on *November 27, 1905.* Burr's alleged

appointment as sole trustee was on *December 27, 1905. He resigned March 12, 1909.*

The alleged appointment of these defendants as three trustees was subsequent to Burr's resignation as sole trustee and must have been subsequent to Burr's resignation as sole trustee.

The action of ejectment was begun *November 28, 1905,* (one day after the alleged adjudication), process of summons was served December 6, 1905, the return day of the summons was on the *first Monday of January A. D. 1906,* and the verdict and judgment in said action was on *March 13, 1906, seventy-five days after Burr's first appointment.*

When Burr resigned he was as dead in law as if physically dead and he has no rights save under his alleged second appointment subsequent to March 12, 1909.

Taylor vs. Savage, 1 How. 286.

Parkhill's Admr. vs. Bank, 1 Fla. 116-127-128.

Judgment Bound Both Port Tampa Company and Defendants as Trustees.

There can be no dispute that one who claims under and in privity with another who is estopped, is himself estopped. And there can be no dispute that defendants, as trustees in bankruptcy, claim under and in privity with the Port Tampa Company the alleged bankrupt.

And there can be no dispute that in actions of ejectment, fictitious parties were long ago abolished in Florida, and that in such cases a single judgment in ejectment concludes the defendant and all persons claiming by, through or under him.

Moreover the question whether this Federal judgment is a bar though the appellees were not parties to it depends on the construction and application of the provisions of the Bankrupt Act. It is not wholly dependent upon common law principles.

It has been repeatedly decided that where a suit is brought against a person either before or after he has been adjudged a bankrupt, if *brought before the trustee is appointed and qualified,* a judgment in such suit for or

against the bankrupt concludes the trustee whether he was a party to it or not; and this by force of the provision of the Bankrupt Act itself.

In such a case the trustee acquires all the title he has pendente lite and is bound by the judgment the same as a purchaser pendente lite. Even more so, because he is not a purchaser for value. In such case the alleged title of the trustee "falls" on him and accrues at the time he qualifies and consequently pendente lite.

Eyster vs. Gaff, 91 U. S. 524.
Johnson vs. Collier, 222 U. S. 538, text 540.
Knapp vs. M. Trust Company, 216 U. S. 545-557.

In the following cases the judgments were held to bind the trustee though rendered in suits brought after the adjudication in bankruptcy.

Burbank vs. Bigelow, 92 U. S. 179, text 181-182.
Holland vs. Morton, 123 Mass. 278.
Brecht vs. Dayton, 34 Minn. 214, s. c. 25 N. W., 348.
Johnson vs. Collier, 222 U. S. 538.

Hampton vs. Rouse, 22 Wall. 263, text 275; Sedwick Assignee vs. Grinnell, 9 Benedict's Rep. 430 by Justice Blatchford are unanswerably reasoned to the same effect.

The action in ejectment in the Federal Court having been begun November 28th, and process served December 6th, and Burr as sole trustee *not having been appointed until December 27* (when he was qualified is not *known* but not until after he was appointed), said Federal Court had jurisdiction of the parties and subject matter and was bound to proceed to judgment. Burr as sole trustee having been appointed after the action began acquired no title as trustee until he was qualified. He so acquired *pendente lite* of the action in ejectment and is bound by it. It was impossible for Hull to make him a party defendant to the action when he commenced it, because he had not then been appointed trustee. Being a citizen of Massachusetts it was impossible for Hull to make him a party *after the action was begun*. Hull by delaying action might have been barred by the statute of

limitations, (Johnson vs. Collier, 222 U. S. 538) even though Hull had known of the bankruptcy proceedings.

No Defense.

The Port Tampa Company did not defend the action of ejectment. Doubtless in the light of the title of record in Hull and its own resolution it concluded there was no defense, and it would have been a waste of its assets to have done so. Not having defended nor applied for a postponement of trial, as it could have done, it and the trustee not having applied to become a party, both are concluded and this court has repeatedly so ruled.

Scott vs. Ellery, 142 U. S. 384.

Jaquith vs. Rowley, 188 U. S. 626.

The rule is stated in Thatcher vs. Rockwell, 105 U. S. 469 and authorities cited.

As the judgment was not taken until seventy-five days after Burr was appointed sole trustee, and as the bill alleges *all the assets of the bankrupt were in Florida and that it never did any business* except in Florida, (Rec. pages 9 and 12), it will be presumed that Burr had notice of the said action. It was his duty to have known of it and gross negligence if he did not, which cannot be presumed.

No Attention.

Neither the District Court nor Court of Appeals considered or even mentioned this judgment in ejectment.

On the first branch of the case then it is submitted (a) That the bill states a perfect cause of action for a decree quieting title, etc., even conceding that defendants possess the character of trusees.

(b) That a decree as specially prayed for is not prohibited by Section 720 Rev. Stats. nor by the rule of comity.

(c) That an effective decree ending all litigation can be rendered under the prayer for general relief without violating Section 720 or the rule of comity.

PROPER FORM OF DECREE UNDER PRAYER FOR GENERAL RELIEF.

"It is ordered, adjudged and decreed that legal title and right of possession of the lands and personal properties described in the bill of complaint be and they are hereby established to be vested in the Prairie Pebble Phosphate Company, one of the plaintiffs, as against the defendants claiming as trustees of the estate of the Port Tampa Phosphate Company in bankruptcy; and that defendants claiming as such trustees have no right, title or interest in to or of the said properties or any part thereof."

A like decree was affirmed in Coder vs. Arts, 213 U. S. 228-245.

Such a decree would "not stay any proceedings" pending in the Florida Court within the meaning of Section 720 R. S., when the present suit was brought.

Nor would a decree that defendants are estopped by the Federal judgment from asserting any interest in the 440 acres of land.

Such or a like decree would not enjoin the defendants as plaintiffs in the supplemental bill from prosecuting it to a final decree.

If such a decree was in their favor making them parties to Burr's abated bill, then and not till then a decree of the Federal Court below in the form above suggested could be pleaded in bar of the further prosecution of Burr's bill in the State Court the same as it could be pleaded in bar of any new suit these alleged trustees might bring in the State Court.

And the suit on Burr's bill in which, as adjudicated, no further proceedings can be had until revived *has no vitality as a pending* suit until there is a decree of revivor of it in some forms, and if such a decree should ever be obtained the pendency of Burr's bill as a suit having vitality would be of the date of the revivor so far as Section 720 is concerned.

Certainly Congress never intended by Section 720 to

prohibit the prosecution of a suit in a Federal Court to a final decree, that could be pleaded in bar of another suit pending in a State Court, between the same parties, where such final decree can be rendered in any form that does not enjoin proceedings pending in a State Court in which the State Court acquires jurisdiction of the same questions after the Federal suit is brought.

Fifth, Sixth and Seventh Specifications.

These are as follows, (Rec. 47):

Fifth. Said Court of Appeals erred in ruling in effect that the District Court had not jurisdiction to render a decree depriving the defendants as alleged trustees in bankruptcy of any benefit of the alleged decree adjudging the Port Tampa Phosphate a bankrupt, on the ground that the said alleged decree, under which defendants exclusively claim, was obtained by fraud and perjury perpetrated upon the said District Court as a court of bankruptcy.

Sixth. Said Court of Appeals in its opinion states as follows, to-wit: "The facts in this case are so fully stated in the opinion of the learned District Court that we do not find it necessary to restate them;" and based its judgment upon the facts as stated by the District Court. This was error in this: the material facts of the resolution of the Port Tampa Phosphate Company, set forth in the 9th section of the bill of complaint, whereby said Company sold to complainant Joseph Hull all the interests it ever had in the properties, more than five months before the petition in bankruptcy was filed; and the judgment recovered by said Hull in the ejectment suit against the said Company in the Florida Federal Court, and set forth in the 10th section of the bill of complaint, are not mentioned or referred to in the opinion of the District Court, and the said resolution, and the said judgment conclusively estop and preclude the Company and defendants as trustees claiming under said Company from asserting any interest in the properties involved

in this suit, which said Court of Appeals did not consider or allude to in its opinion.

Seventh. Said Court of Appeals in its opinion declared and ruled as follows, to-wit: "We are also entirely satisfied with his conclusions and his reasoning (of the District Court) so far as the same was necessary to the conclusions reached by him." This ruling of the Court of Appeals was erroneous in this: that it affirms the conclusions and errors of the District Court upon the following points, to-wit:

(A) The District Court held that the bill of complaint showed that it as a court of bankruptcy, had jurisdiction of the subject matter and person of the Port Tampa Phosphate Company to adjudge said Company a bankrupt.

(B) That fraud and perjury of the officers of said Company, three of whom were the petitioning creditors, all of which were admitted by the demurrer, were not available to vitiate and avoid the alleged decree in bankruptcy, and defendants character as such alleged trustees.

(C) That it was immaterial to the plaintiffs whether they were sued in the Florida Court by the defendants as trustees, or by the said alleged bankrupt, whereas, the said resolution of the bankrupt and the said judgment estopped and precluded it from suing the plaintiffs; and the bill avers that its said officers who were the petitioning creditors, and others of its officers, fabricated the proceedings in bankruptcy and every jurisdic-
75 & 76 tional fact, in said proceedings for the sinister purpose and intent of corruptly obtaining said alleged decree in bankruptcy, and an apparent, but not real, trustee, who could sue, vex and annoy the present plaintiffs.

(D) The District Court ruled that if the facts stated in the plaintiffs' bill of complaint are true (they are admitted by the demurrer), they constitute a complete defense to the suit by the present defendants as plaintiffs in the Florida Court, and that such defense in the State Court, defeated jurisdiction of the Federal Court to

grant any relief, whereas, it is apparent from the averments in sections 11th and 12th of the present bill of complaint that there is no suit pending in the Florida Court, in which said facts can be set up as a defense, and the Florida Supreme Court, has expressly so decreed.

These assignments may be discussed together. We first discuss the seventh assignment.

The Latter Part of Sections 12 to 29 of the Bill States a Fraudulent Combination by the officers of the Tampa Company to Create a Trustee, With the Apparent Right to Attack the Plaintiffs' Title, Knowing There Was No Foundation for Bankrupty Proceedings. A Consideration by the Court of That Part of the Bill is Specially Urged.

First: As a part of the fraudulent scheme a pretended act of bankruptcy is alleged as follows, to-wit:

"And your petitioners further represent that said Port Tampa Phosphate Company is insolvent, and that within four months next preceding the date of this petition the said Port Tampa Phosphate Company committed an act of bankruptcy, in that it did heretofore, to-wit, *on or about the ninth day of October, A. D. 1905 suffered and permitted,* while insolvent as aforesaid, certain creditors to obtain a preference through legal proceeding, by process of attachment, and not having at least five days before a sale or final disposition of its property effected by such preference, vacated or discharged such preference." See Petition Rec. p. 19.

It was legally impossible that a creditor on November 8th, (date of filing the petition) could have obtained a preference by legal proceedings *"by process of attachment"* issued as the petition states on October 9th.

Every court having the question before it has ruled that the issuing and levying a writ of attachment upon the property of a debtor is not an act of bankruptcy *and does not state the essential jurisdictional fact of an act of bankruptcy.* So ruled by Judge Putnam in Parmenter

Manufacturing Company, 38 C. C. A. 200; 97 Fed. 330. Also so ruled in an elaborate opinion by *Judge Dodge* in In Re Crofts Riorden Co., 185 Fed. 931. And by Judge Aldrich (of the court below) in In Re Vetterman, 135 Fed. 443. Cases collected in Collier on Bankruptcy treating of clause 3, Section 3 of the Act. Holmes vs. Baker, 88 C. C. A. 104-105.

The Bill, page 12 near top, *alleges that all the property the bankrupt ever owned was located in Florida;* so no attachment could have been levied except in Florida, and by the laws of that State the creditor by attachment acquires no right to appropriate the attached property to pay his debt until final judgment.

General Stats. of Fla., Secs. 2115-2119.
Aldrich vs. Dzialynski, 14 Fla. 187 and text.
Smith vs. Bowden, 23 Fla. 157. Those statutes were in force in 1905.

The jurisdictional fact must *affirmatively appear.*

Galpin vs. Page, 18 Wall 350-351.

In Scott vs. McNeal, 154 U. S. p. 46, this court declared: "No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party." And further said: "*and such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist.*" And if such fact is affirmatively alleged but proven false the judgment is void.

Thompson vs. Whitman, 18 Wall. 457.
Scott vs. McNeal, 154 U. S. 46.
Bigelow vs. Old Dominion Copper Co., 225 U. S. 135-136 reviewing Thompson vs. Whitman.

False.

Section 14, Rec. p. 10, avers that the averment of a preference in the petition was false, and the petitioning creditors knew it was false. The demurrer admits it was false.

The following results are inevitable:

(A) The petition did not state the jurisdictional fact of an act of bankruptcy.

(B) The pretended statement of such fact was false and petitioning creditors knew it.

(C) Conclusion of Law.

The pretended preference alleged is a *bald conclusion of law,* without vitality as a pleading, and if otherwise it possessed any vitality *it was destroyed by the words "by process of attachment." The petition names no creditor, nor court, nor State, nor county where the process of attachment issued.*

A conclusion of law states no issuable fact, is not provable and is not *admitted by demurrer.* And as a pleading is a nullity. Gould vs. R. R. Co., 91 U. S. 526-536; Pennie vs. Reis, 132 U. S. 469; Alabama vs. Burr, 115 U. S. 424, text 425-428; Ray vs. Wilson, 29 Fla. 342, 352, 353; Ohm vs. San Francisco, 92 Cal. 437, where held that a conclusion of law "*will be treated as if not alleged.*" 12 Vol. Enc. Pl. & Pr. pp. 1024 et seq.

Averments in the language of the Bankrupt Act in respect to an act of bankruptcy are held not to state a jurisdictional fact in the following cases: In Re Plotke 44 C. C. A. 282; Clark vs. Henne & Meyer, 62 C. C. A. 172-180, specially applicable, reviewing cases. Judge Deady in Re Randall, Deady's Rep. 557; In Re Sig H. Rosenblatt, 113 C. C. A. 506, held by Judge Lacombe that an averment in the language of the Statute does not state an act of bankruptcy.

Wilson vs. Bank, 17 Wall. 481-482,

The bill avers that no judgment was ever obtained against the Company and that the only attachment proceedings were taken at the instance and controlled by the petitioning creditors. Rec. p. 10.

Preference Defined.

This court has frequently ruled that creditor obtains no preference until he has acquired indefeasible power to appropriate the debtor's property to pay his claim *and thereby diminish the estate of the debtor.*

Bank vs. Bank, 225 U. S. 178.
W. T. & T. Co. vs. Brown, 196 U. S. 502-509.
Bank vs. Massey, 192 U. S. 138.
Rector vs. Bank, 200 U. S. 405-419.

Company Never Committed an Act of Bankruptcy.

Sections 15 and 16 of the bill, Rec. p. 11, charge that the Port Tampa Company never committed an act of bankruptcy and that all of the directors of the Company and their attorneys knew it had not.

Another False Jurisdictional Fact.

The petition states that the Port Tampa Company had had for the greater part of six months, etc., its principal place of business in Boston. The bill, page 9 of the record marginal page 12 and page 12, avers that the Company never did any business except in Florida and that all its assets were in Florida, and the petitioning creditors knew it. And the bill specially avers in Section 17, Rec. 11 and 12, that the allegation in respect to the place of business in Boston is untrue, and the "said Company never did any business * * * * except in the State of Florida" and "that whatever properties the said Company owned or pretended to own were in the State of Florida at the time said petition was filed."

Allegation as to Principal Place of Business is Jurisdictional. Section 2 of the Act.

Collier on Bankruptcy treating of that section, pp. 26 to 28, citing cases. Dressel vs. North State Lumber Company, 107 Fed. 255; M. S. S. Co. vs. City of M., 83 Wis. 590, 18 L. R. A., 353; In Re P. A. Co., 165 Fed. 249; In Re H. S. Mfg. Co., 110 Fed. 352; In Re Little 3 Benedict, 25-27, where Judge Blatchford refused to discharge the debtor because the petition was in New York, whereas his place of business was in New Jersey. If the Company

had committed an act of bankruptcy, the Florida Federal Court was the only court having jurisdiction of it.

Principal place of business was in Florida.

Home Powder Company vs. Geis, 123 C. C. A. 95, text 98, (204 Fed. 568), a late case peculiarly applicable.

Jurisdictional Facts Fabricated.

The bill avers that all pretended jurisdictional facts stated in the petition were false, and were fabricated by the Directors of the Company for the purpose of falsely manufacturing an apparent case of jurisdiction and imposing on the Court, and were known to be untrue by said officers and petitioning creditors. See page 11 of Record.

This Court is specially urged to read and consider pages 10, 11, 12, 13, 14, 15 and 16 of the Record.

On those pages the following facts are alleged and are admitted by the demurrer:

First: That Hiram W. Rowell, William F. Wills, Benjamin L. Emerson, Robert Hamilton and Hayes Lougee were the only Directors of the Company, (the directorate consisting of *five members*), *and owned a large majority of the stock of the Company.*

Second: That each of the said Directors was or claimed to be a creditor of the Company.

Third: *That said Rowell, who was also President of the Company, Hamilton and Lougee were the petitioning creditors.*

Fourth: That in the bankruptcy suit there was no adverse element, the Directors were *domini litis* of both sides of the case.

Fifth: Being domini litis of both sides of the case, and owning a majority of the stock, the Company was powerless in its corporate capacity to appear to and defend the petition, though it appears from the allegations in Section 20 of the bill, page 12 of the record, that *from the standpoint of these Directors* the Company was not

insolvent and that it had a perfect defense to the petition.

Sixth: That these Directors owning a majority of the stock, by their combination did not intend that the Company should make any defense and rendered it physically and legally impossible for the Company to make any defense. See Sections 23 and 24 of bill, Rec. p. 13.

Seventh: That these Directors concealed from the Court the fact they were Directors, and one its President, and made it appear to the Court that the petition was an involuntary petition whereas it was in law and legal effect a voluntary petition by the Company prohibited by the statute. See Section 24.

Eighth: That by such combination of the Directors and frauds on the Court committed by them, the alleged decree in bankruptcy was obtained by fraud and fabrication of facts and imposition on the District Court.

Points of Law Applicable.

First: Where it appears that the plaintiffs in a suit dominated the defendants, the proceedings are mere "*paper forms*" *and a nullity.* Lord vs. Veazie, 8 How. 251-256; Haley vs. Bank, 12 L. R. A. 815-817-818, where a collusive suit between a corporation and its secretary was dismissed. South Springs * * * Mining Co. vs. Amador * * Gold Min. Co., 145 U. S. 300; 12th Vol. Enc. Pl. & Pr., pp. 166 to 168, where the authorities are collected. In Re Burdick, 162 Ill. 48.

Second: The President and Directors of a corporation cannot lawfully be petitioning creditors by reason of their relationship to the debtor.

Sec. 59e of Act of 1898. Brandenburg on Bank-Bankruptcy, Secs. 933-934.

In Re Independent Thread Co., 113 Fed.

In Re Bates Mch. Co., 91 Fed. text 629 by Judge Lowell.

Third: Where it appears that a decree has been obtained by fraud, equity will not permit any rights thereby obtained to be asserted against a stranger to the decree.

Marshall vs. Holmes, 141 U. S. 589.
12 Vol. Enc. Pl. & Pr., 202.
City vs. Riley, 140 Mass. 488.
Stafford vs. Weare, 142 Mass. 231.
Vose vs. Morton, 58 Mass. 27 by Ch. J. Shaw.
2d Vol. Pom. Eq., Section 919 declares:

"When a judgment or decree of any court, whether inferior or superior has been obtained by fraud the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, *and it may be attacked and defeated* on account of fraud in any collateral proceedings brought upon it." Consequently, the decree can be *directly attacked* as by the present bill it is.

The English language is incapable of stating a more flagrant case of fraud and imposition upon the court than is stated in the present bill.

Fourth: The frauds were perpetrated with intent and design of injuring the plaintiff Hull through whom the Pebble Company claims *and it is so alleged in the bill,* page 9, marginal page 12. Therefore, the following principle declared by Freeman on Judgments, 2 Vol., Sec. 336, applies:

"Whenever a judgment or decree is procured through fraud of either of the parties, or by collusion of both, for the purpose of defrauding some third person, he may escape from the *injury thus attempted by* showing even in a collateral proceeding the fraud or collusion by which the judgment or decree was obtained." Citing many cases.

Directors No Power to Admit Insolvency and Willingness to Be Adjudged Bankrupt.

Even the Directors of a corporation existing under the laws of Massachusetts have no authority to admit its inability to pay its debts and its willingness to be adjudged a bankrupt. That right depends upon the laws of the State.

Home Powder Company vs. Geis, 123 C. C. A. 94, text 96, citing In Re Bates Machine Company, 91 U. S. 625.

In Re Quartz Mining Company, 157 Fed. 243 affirmed under the title of Van Emon et al. vs. Veal, 85 C. C. A. 547, 158 Fed. 1022.

Sixth Assignment or Specification. Rec. 47.

Fifth: The error insisted upon in this specification has been discussed under specifications Nos. 2, 3 and 4.

Revivor of Suit.

The ninth specification has also been already partially discussed. We add that upon the facts in this bill, Burr's bill can never be revived and that there is no law or rule of court under which the State Court can decree a revival of Burr's bill. Under the head of "Revivability" this question is discussed in appellants' brief on the motion to dismiss, pp. 35 to 36, to which the Court is referred.

The Eighth Specification of Error. (Rec. 48).

This claims error in the Court of Appeals in not modifying the decree of the District Court so as to read "without prejudice" and so it could not be pleaded as res adjudicata.

The District Court, as shown by its opinion, ruled that the court of bankruptcy had jurisdiction of both the cause of action and of the person, and that appellants could not attack its jurisdiction nor show it was obtained by fraud, but finally remits the appellants to the Florida Court to obtain by an answer the remedy sought by this bill. Out of abundant caution the decree dismissing the bill, (if otherwise correct) should read "*without prejudice*" to prevent any contention that any point decided is res adjudicata.

Durant vs. Essex Company, 7 Wall. 107, text 109.

In the petition for a rehearing, Rec. p. 41, the Court of Appeals was asked to so modify the decree of the District Court. And that court in its opinion on the petition for a rehearing said as to that: *"We only remark that we see no occasion therefor,"* etc. But the State Court may not take the same view as to the effect of the decree.

Sixth: Section 21e of the Bankrupt Act of 1898.

The contention that said section precludes judicial inquiry into the validity of the bankruptcy proceedings is answered in Appelants' Brief on the Motion to Dismiss, pp. 26 to 28 inclusive to which the Court is referred, and the Court will please consider those pages repeated here.

Seventh: No Jurisdiction of the Person of the Port Tampa Phosphate Company.

The bill makes an attack upon the jurisdiction of the Court of Bankruptcy over *the person of that Company.*

Exhibit "B," Rec. p. 20, shows that the subpoena on the petition was not signed by or in the name of any clerk of the court but by "Mary E. Prendergast, Deputy Clerk." And the same Exhibit shows that service of this subpoena was not made by or in the name of any marshal of the court but by "J. H. Waters, Deputy U. S. Marshal," and the services was made on "Emerson, Clerk of said Corporation" and not on any officer who impersonated the Company.

Exhibit "C," Rec. p. 29, shows that the only appearance was in the following words: "In the above cause I appear for the Port Tampa Phosphate Co. (Sign) J. H. Robinson," not showing that he was a member of the bar of the court, *or that he was even an attorney at law.*

This appearance by J. H. Robinson was the result of of *"artifice and stratagem"* on the part of the petitioning creditors and officers constituting a majority of the Direc-

tors, so as to make it falsely appear on record to the court that the Company had appeared to the petition against it.

They were doubtless conscious that the subpoena by a person calling herself a deputy was void, that the service by the person calling himself a deputy on a *clerk of the corporation* was void, and to cure such defects got this J. H. Robinson to file said appearance.

Allegations in the Bill in Respect to Appearance.

On page 12, Sec. 18, it is alleged that the subpoena and return thereon and each of them "*was illegal, unauthorized and void, and that the J. H. Robinson was never in fact authorized by the said Company to enter for it the said appearance.*"

And on page 10, Sec. 14, it is averred that "*said Company did not on or prior to November 27, 1905, or at any other time voluntarily submit itself in the said proceedings to the jurisdiction of the said court.*"

The Controversy Immaterial.

But any point about the jurisdiction of the person is not important. Upon the facts in the bill to which the attention of the Court has been directed, it is obvious that the officers of the Company who were also creditors *did not intend that the Company, in its corporate capacity, should defend the petition* and had so combined and contrived that said Company could not possibly defend. The Company was throttled. What they had done and were intending to do under color of being creditors, they did not as Directors intend to undo and defeat themselves in their scheme to obtain an adjudication, by permitting the Company to defend. The Company could no more defend the petition than could a natural person, who after service of subpoena in bankruptcy, had been *kidnapped by banditti* and concealed in a cave or iron vault and kept there until proceedings in bankruptcy had been wound up.

It was a part of the fraudulent scheme to obtain an *adjudication on paper.*

Point of Law.

But we think it well settled that in the absence of any statute changing the common law, (and there is none in this case) the act of a deputy, *when the law requires it to be done* by his principal, or when done by a person calling himself a deputy without disclosing his principal is a nullity.

1st Vol. Greenl. Ev., Sec. 506.
Morris vs. Patchin, 24 N. Y. 394.
Sampson vs. Overton, 4 Bibb. 409.
Garneau vs. Dozier, 100 U. S. 7.
Gibbens vs. Pickett, 31 Fla. 147;

where on page 15 the authorities are collected, and where held service by a deputy sheriff of a subpoena in chancery not disclosing his principal was a nullity.

Return Void.

The return of service by "J. H. Waters, Deputy Marshal" does not show that the subpoena ever went into the hands of the marshal of the District Court of the United States for the District of Massachusetts, *nor of what court he was a deputy marshal. For that reason alone the service was void. 31 Fla.,* 151 at bottom.

Section 558 of the Rev. Stats. of the United States requires a deputy clerk to act *in the name of the clerk.*

Judicial Notice.

One court cannot take judicial notice that any particular person is a deputy clerk or marshal of another court, but can take judicial notice who the principal is.

Appointment of Defendants as Trustees Void Even Though the Decree of Adjudication Was Valid.

The 26th Section of the bill, Rec. 14, states facts establishing that the appointment of defendants as trustees was void even though the decree was valid.

First: There was no notice of a meeting of creditors given as required by the statute.

Second: *The appointment was made by one creditor only, William F. Wills the Treasurer of the Company, when there were ten other creditors.*

Third: The appointment was made by *Wills alone* before Burr *had resigned and when there was no vacancy in the office of trustee.*

Fractions of a day in such a case are material.

4 Kent's Comm., 8th Edn. top page 98.
Clute vs. Clute, 4 Denio 241-244.
Lemon vs. Staats 1 Cowen 592.
Richardson et al., 2 Story's C. C. Rep. 571, (a bankruptcy case).
Bank vs. Burkhardt, 100 U. S. 689.
8 Vol. Am. & Eng. Enc. of Law, 2d Edn., 742-743 notes.

In Bankruptcy cases the court will inquire as to the precise time of an act even to the divisions of an hour.

Ex parte DeObree, 8 Ves. Jr. 82.
Sadler vs. Leigh, 4 Campb. 197.
Thomas vs. DeSauges, 2 B. & Ald. 586.
Ex parte Duprene, 1 Ves. & B. 51.
Wydown's Case, 14 Ves. Jr. p. 80.

Form No. 55 prescribed by this court requires notice shall recite that "*a vacancy exists in the office of trustee.*"

An appointment to fill a vacancy when no vacancy exists is void.

Griffith vs. Frazier, 8 Cr. p. 1, where so held by Ch. J. Marshall.
People ex rel. Woods, 91 N. Y., 616-633.

Section 26 of the bill shows that there was "*a stratagem and artifice*" to procure an appointment by Wills alone without notice to other creditors. See 91 N. Y. 633, where held the appointment was "*a nullity.*"

Where all persons entitled to vote do not have notice of the meeting, the appointment is void.

People vs. Batchelor, 22 N. Y. 134, text 135.

See 8 Vol. Enc. of Law, 776, Notes 4 and 5.

Judicial Comity.

"Comity however has no application to questions not considered by the prior court."

Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S., text 489.

"Clearly it applies only to questions which have been *actually decided and which arose under the same facts.*" Id.

"It requires no court to abdicate its individual judgment."

Id. p. 485 in Syllibi.

Some Other Points. Judicial Comity.

There is no brand of judicial comity that will justify a Federal Court of Equity to forebear deciding questions in a cause of which it has jurisdiction simply on the ground that a *State Court may at some future time* be possessed of the same question between the same parties, nor even on the ground that the State Court has already possession of the questions, *provided* it has not taken the property involved into its custody.

Parties.

In cases like this at bar the alleged trustees are the only necessary parties.

Kerrison Assignee vs. Stewart, 93 U. S. 155, text 158-160.

Vetterlein vs. Bowes, 124 U. S. 169, text 172.

Story's Eq. Pl. Secs. 141-149-150.

Some Points on Judge Dodge's Opinion.

First: From his opinion it seems he examined the record of the bankruptcy proceedings and drew conclusions therefrom, Rec. p. 27. This he had no right to do. He was bound by the facts in the bill admitted by demurrer.

Storm vs. U. S., 94 U. S. 76.
Hecht vs. Boughton, 105 U. S. 235.
South Carolina vs. Wesley, 155 U. S. 542-544.

Second: He suggests that the act of bankruptcy might have been more specific *by amendment or dismissed* if the "objection had been raised at the time." Rec. 28 at bottom.

But the present bill shows:

(a) It could not have been truly amended so as to state a case within the jurisdiction of the court.

(b) The Company's mouth was closed and it *could not raise the objection.*

(c) Appellants are strangers and could not have been heard.

Third: He suggests that any want of a valid appearance was cured *by filing schedules subsequent to date of adjudication.*

But a void judgment or decree is always void.

Even an amendment supplying jurisdictional facts does not cure its voidness, but will lay a foundation for a subsequent valid decree. Cases cited in Vol. 2 Enc. of Pl. and Pr. So ruled by Judge Sawyer in the bankruptcy case of In. Re Lady B. M. Co., 2 Abbott's C. C. Rep. (9 Cir.) 527-529-530, where the precise point is ruled.

Fourth: He absolutely ignored and repudiated the unbroken line of adjudications that placing an attachment on a debtor's property is not an act of bankruptcy *and creates no preference.* Rec. 28. He disregarded and repudiated his own elaborate decision in In Re Crofts R. Co. 185 Fed. 931; 26 Am. B. Rep. 444; and Parmenter Mfg. Co., 38 C. C. A. (1st Cir.) so holding, which have been followed by other courts.

Fifth: He disregarded the allegation in the bill that the Company never authorized J. H. Robinson to appear for it. Rec. 20 at bottom.

Resort to the Federal Court Fully Justified by the Facts.

First: Because appellants had the constitutional right to invoke the jurisdiction of the Federal Court on the ground of diverse citizenship, and on the ground of Federal questions involved.

Second: Because there had been in the Florida State Court no decision of any of the questions of fact or law presented by appellants' bill that could be pleaded in bar of their bill.

Third: Because it did not,—and it is absurd to suppose—(a) That Burr's bill set forth that appellants had a perfect legal title of record; (b) or that such title was fortified by the Federal judgment in ejectment; (c) or the resolution of the Port Tampa Phosphate Company by which it sold to Hull all its equitable rights in these properties. Therefore the same questions of fact and law were not tendered in Burr's bill that are tendered by appellants' bill.

Fourth: Because the fact that Burr's bill may on the supplemental bill be revived *at some future time,* thus giving appellants a chance to set up by answer in defense thereto the same facts averred in this present bill in the Federal Court, on which they pray *affirmative relief,* is no reason why appellants should have waited to see whether that event will happen, and forbear until it does happen, invoking the jurisdiction of the Federal Court by an original bill wherein they are plaintiffs against these defendants.

Fifth: Because in the event a decision of the questions presented by appellants' bill in a suit in the State Court should be rendered, it would be reviewable on writ of error to said State Court by this Court as the court of last resort, and an end of the litigation on appellants' original bill can be obtained much quicker and at less

expense that it can through the Supreme Court of Florida.

Sixth: Because the only question pending and before the State Court when appellants' bill was filed (Aug. 8, 1912), is whether or not the present defendants possess the character of trustees, and that question is tendered and the only one tendered by their supplemental bill to revive and was not decided when appellants filed their bill, *and has not yet been decided.* And the fact that such question is pending in the State Court is not a bar to appellants' bill in the Federal Court below, though said bill raised the *same question as the second ground for relief,* to-wit: that defendants are not trustees, *but in no way connected with the grounds of relief stated in the first nine sections of appellants' bill.*

Seventh: *What the State Court Had Decided on Interlocutory Appeals. A Further Reason.*

On appeal from an interlocutory order overruling pleas of appellants, defendants to Burr's bill, before he resigned, the Supreme Court of Florida decided that a trustee in bankruptcy was not bound by a judgment in ejectment against the alleged bankrupt, (the Port Tampa Company) *because he was not a party to it, even though he was not appointed trustee until after the suit was brought in which the judgment was rendered.* And on the said appeal said State Court further decided that a decree adjudging the Port Tampa Company a bankrupt by the U. S. District Court in Massachusetts *ipso facto* and by operation of law placed any property said Company owned located in the State of Florida *in custodia legis* of the said District Court. See Hull vs. Burr, 61 Fla. 625, Syl. No. 4, text 628-629. And the said State Court on appeal from an order sustaining exceptions to part of the answer of appellants to the said supplemental bill to revive, the Supreme Court of Florida affirming said order rendered an opinion which the present defendants Burr, Simpson and Edwards and their counsel insist *decided that neither in defense of the said supple-*

mental bill nor in defense of Burr's bill (if revived) *can these appellants make any collateral attack upon the validity of the bankruptcy proceedings, and no matter how void they are, it cannot be shown in defense of either of the said bills in the State Court.* See Hull vs. Burr, 64 Fla., 84, text 87 (last part) and 88.

Not one of the cases cited by the Florida Court on the said page 88 supports any such crude proposition.

After such judicial tergiversations, refusing to be bound on Federal questions by the repeated judgments of this Court, a resort to the Federal Court was not too soon.

We submit the demurrer should be overruled, the defendants required to answer the bill, and all questions should be decided that are presented by the demurrer to control the court below in the future progress of the cause.

H. BISBEE,
GEO. C. BEDELL,
RUSHMORE, BISBEE & STERN,
For Appellants.

In the Supreme Court of the United States

JOSEPH HULL, et al.,
Appellants,

vs.

ARTHUR E. BURR, et al.,
Appellees.

No. 767

BRIEF OF THE ARGUMENT AND REPLY TO APPELLEES' BRIEF.

The controlling considerations in this cause are as follows and they are in nowise met or mitigated by anything offered in Appellees' brief.

The facts stated in this bill and admitted by the demurrer presented a plain case for equitable relief quieting title.

a. The bill deraigned plaintiffs' title to the common source.

b. It deraigned defendants' claim to a common source.

c. It showed defendants' claim to be invalid.

(1) Because of the written assurance contained in the Resolution of the Port Tampa Company set out in the 9th paragraph of the bill (Rec. p. 7) and the payment of money set out in the bill.

(2) Because the title of Hull had been adjudicated to be valid by the Federal Court in Florida, in the ejectment suit brought by Hull against the Port Tampa Company.

(3) Because the defendants themselves are asserting an authority as officers of the United States District Court for the District of Massachusetts that is illegal and inequitable.

d. The bill also alleged possession in the ~~Trust~~ Company at the time of the filing of the bill. (Rec. p. 6). This is not questioned.

A question is raised in the brief as to who had possession at the time of the adjudication in bankruptcy but that is not really material to a determination of the case for the ~~Trust~~ Company was in possession at the time of the filing of the bill and its title was valid on the averments of the bill.

These facts made a case for equitable interference quieting title.

1 Pomeroy's Eq. Juris. 2d Edn. Sec. 272.

The case was properly brought in the Federal Court independent of diversity of citizenship, (a) because it sought the enforcement of a judgment of a Federal Court, in itself a sufficient ground of Federal jurisdiction, (Crescent Live Stock Co. vs. Butchers, 120 U. S. 146-7) and

(b) Because it could not well be brought elsewhere, assailing as it did the authority of Federal officers.

Gumbel vs. Pitkin, 124 U. S. 131.

Bock vs. Perkins, 135 U. S. 628.

Ex parte O'Neal, 125 Fed. 967.

This court has therefore jurisdiction.

Warner vs. Searle & Hereth Co., 191 U. S. 205.

Henningsen vs. U. S. Fidelity & Guaranty Co., 208 U. S. 404.

The defendants contend that the judgment in ejectment is void because the suit was begun and the judgment rendered in Florida after the adjudication in Massachusetts, but this is an erroneous view because during the interim between the adjudication and the qualification of a trustee the bankrupt holds as trustee and may sue and

be sued with respect to the estate, and the trustee when qualified takes pendente lite on the principles laid down in Eyster vs. Gaff, 91 U. S. and Johnson vs. Collier, 222 U. S. and other cases cited in the principal brief.

But besides that the whole bankruptcy proceeding, upon the facts stated in the bill, was a fraud and a sham and unavailable to defendants to avoid the judgment.

It is said however that the judgment in ejectment is invalid because of informality in the U. S. Marshal's return to the writ, and to support that contention counsel cite *Seacoast Lumber Co. vs. Camp Lumber Co., 63 Fla. 606.* But that case is not in any way in point. The court had there to deal with a service made in a county other than that in which the suit was brought, and held that the service must be sustained under the 5th clause of Sec. 1019 Rev. Stats. Fla. of 1892, and that where that clause was resorted to the return must show absence from the State of officers or resident business agents.

But where service is made in the county where the suit was begun, as was the fact in this ejectment suit, it is only necessary that the return should show absence from the county of the superior officers. Florida Central Etc. R. R. vs. Luffman, 45 Fla. 282. The court there says: "The officer serving the writ, before effecting service upon one of the inferior agents of the corporation must ascertain that none of those of higher degree is within the reach of his official arm; but he cannot be expected to know that they may not be found in some distant part of the State, and that is not required to be shown except in those cases where the statute plainly demands it."

The official arm of the Marshal was coextensive with the District and the District only. Process of the State Court runs throughout the State and is directed to all and singular the sheriffs of the State of Florida, ch. 4397 Laws of Fla., Acts of 1895. But the process in question here ran only throughout the District and the Marshal had no power to act beyond the District.

Lung vs. Northern Pacific, 19 Fed. 254-257.

Millers Admr. vs. Norfolk & Western, 41 Fed. 431.

Re Anderson, 94 Fed. Rep. 487.

Walker vs. Lee, 47 Fed. Rep. 645.

The return here (Rec. pp. 23 and 24) shows service upon "N. B. Childs one mile from Mulberry, Polk County, Florida as the person having the property herein described in his possesion; and as the agent of the Port Tampa Phosphate Company. * * * * The President, Vice President, Secretary, Treasurer, Directors and all other officers of said Port Tampa Phosphate Co. to the best of my knowledge, and information being out of the said Southern District of Florida." (Rec. pp. 23 and 24).

The legal requirement with respect to the return is as follows:

"All officers to whom process shall be directed shall note upon the same the time when it comes to hand; the time when it was executed, the manner of execution, and the name of the person upon whom it shall be executed, and if such person be served in a representative capacity, *the position occupied by him.* A failure to set forth the foregoing facts shall invalidate the service, but the return shall be amendable so as to state the truth at any time upon application to the court from which the process issued, and upon such amendment the service shall be as effective as if the return had originally stated such facts. A failure to state said facts in the return shall subject the officer so failing to a fine not exceeding ten dollars, at the discretion of the court." Rev. Stats. of Fla. (1892) Sec. 1026.

The return showed *facts,* not conclusions, viz: that service was upon the corporate agent in possession, and it would be difficult to imagine a more effective service.

The Marshal's return showed therefore a faithful compliance with the law, and was in the customary form, as must be presumed to have been considered by the judge who presided over the trial of the ejectment suit. His ruling on this point will not be lightly overturned. Shep-

ard vs. Adams, 168 U. S. 618. (In Florida there is in the statutory action of ejectment no judgment by default, but plaintiff must prove his case in open court to the satisfaction of the judge and jury.)

But independent of whether this judgment in ejectment can be sustained, and whether the bankruptcy proceedings were valid or invalid the bill shows a plain case for quieting title, and neither of the courts below decided the contrary, but in each instance the case went off on a supposed obligation of comity that leaves the plaintiffs without relief.

Following are some specific.

COMMENTS ON APPELLEES' BRIEF.

First: It assumes no equity in the bill on the ground that the controversies stated in the present bill are pending in the State Court between the same parties. This assumption has no basis of truth, for upon the facts admitted by the demurrer, appellees are not parties to any suit in Florida, but are trying to be made parties.

Second: It assumes that the same facts are stated in Burr's abated bill that are stated in the present bill. This assumption is absurd. See Brief pp. 1 and 2.

"Perversion of Principles."

(A) It says the bill assumes that *"complainants in the Florida suit"* are not proper parties, because they do not possess the character of trustees.

Answer, the bill shows that they are not parties at all but are trying to be made parties by a bill to revive.

(B) And may never be made parties because they do not possess the character of trustees.

(C) And further that the Federal Court in Massachusetts is asked to decide question of proper parties to a suit in Florida, which is very obviously not so.

(D) The brief says further the bill depends on *the proposition that* the Federal Court below *"can review proceedings in bankruptcy."* This is to say the least inaccurate for attack on the jurisdiction of the Court of Bankruptcy because procured by fraud, has no analogy to a *bill to review the proceedings of that court.*

(E) It says Section 21e precludes inquiry into the jurisdiction of a court of bankruptcy, a proposition we think the court will not commit itself to, in the face of this record.

(F) On pp. 4 and 5 it insists that the decision of the Court of Bankruptcy that it had jurisdiction bars any inquiry into its jurisdiction either collaterally or directly, a proposition that can scarcely be so broadly stated under our constitution.

"Alleged Frauds."

It says there could be no fraud because the Directors could have passed a resolution admitting inability to pay debts and willingness to be adjudged a bankrupt.

(a) Under laws of Massachusetts Directors could not do that.

In Re Bates Machine Co., 91 Fed. 625.

House Powder Co. vs. Geis, 123 C. C. A. 96.

(b) They did not do it and

(c) If they had done so it could not have been made the basis of bankruptcy proceedings except some creditor moved for corporations are by the terms of the Act excluded from voluntary bankruptcy.

(d) Such a resolution if valid, would not remove or condone the fraud of fabricating all jurisdictional facts, as charged in the bill.

(e) It says fraud did not affect rights of Hull, citing cases. But the cases cited *are all cases where* the stranger complained of a judgment obtained by fraud *before* he acquired his interest. Hull acquired his interest in *May*

1905, and bankruptcy proceedings were not commenced until *November 1905.* See Appellees' Brief p. 6.

We have already commented on its strictures with re-respect to the judgment in ejectment.

As for the insistence that the bankrupt was in possession at the date of the ejectment suit, on pages 39 and 40 of the Brief on the Motion to Dismiss or Affirm it will be seen that in Florida the statutory action of ejectment does not even on the part of the plaintiff admit possession in defendant, (much less would it be an effective admission against the ~~Trust~~ Company which claims through Hull's title as well as through the judgment) and the judgment rendered in ejectment gave the plaintiff no mesne profits which it would have done had defendant been in exclusive possession, and obviously on the facts alleged in the bill the possession of the Port Tampa Company was a possession subordinate to the possession of Hull set up in the bill.

Even though the bankrupt had had exclusive possession at the time of the alleged adjudication, that fact would not have helped it for upon the facts alleged in the bill it had no legal or moral right to possession. The appellees say in their brief, pages 8 and 9, that the bill does not allege that the bankrupt owned no interest in the properties. Such an averment would have been but a conclusion of law. The bill does aver facts showing that the Company did own no interest in the properties at the date of the alleged adjudication.

On page 10 it is said that in Section 26 of the bill the contention is made that one creditor could not appoint trustees. The bill makes no such contention but it is submitted that one creditor could not appoint without notice to all creditors, and that no appointment could have been made because there was no vacancy in the office of trustee and no notice given of any vacancy.

Judicial Notice.

We do not understand that upon demurrer to the bill a court of equity is at liberty to suppose any state of facts

consistent with the allegations of the bill, as suggested in the appellees' brief. On the contrary "a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech."

Swift vs. U. S., 196 U. S. 376.

Plaintiff is not called upon to avoid defenses that may or may not be raised. If the appellees have any notion that in any litigation that has been had any adjudication favorable to them has been made, the proper course is for them to plead it in order that the circumstances may be properly inquired into. An opportunity to present the facts of this case to some tribunal is all that the plaintiffs have ever asked, and it is only the refusal under the guise of comity, first by the State Court and later by the Federal Court, to go into this inquiry that has brought the case here.

H. BISBEE,
GEORGE C. BEDELL,
Of Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1913.

No. .

JOSEPH HULL ET AL., APPELLANTS,

vs.

ARTHUR E. BURR ET AL., APPELLEES.

BRIEF FOR APPELLEES.

I.

No Equity in Bill.

Appellants, by their bill of complaint filed in the District Court of the United States for the District of Massachusetts, attempted to remove to that court a controversy pending in equity in the Circuit Court of Polk County, Florida. Removal was sought apparently on the ground that the Circuit Court of Polk County had disagreed with certain of appellants' contentions and had been sustained in so doing by the Supreme Court of Florida. Both the Dis-

trict Court and the Circuit Court of Appeals declined to sustain the bill, and appellants are now before this court on appeal from its dismissal. Whatever may be the merits of the controversy in Florida, it is startling to suggest that there can be any ground for equitable interference with it in the Federal District Court for Massachusetts. Courts of equity exist to aid suitors entitled to equitable relief, and the appellants disclose no ground whatever why the equity court in Massachusetts should interfere with prior proceedings in the equity court in Florida, both of which are governed by and bound to administer the same rules. If the allegations of their bill are true appellants have a full, complete and adequate remedy in the Florida equity court, and there can be no equity in a bill to withdraw the controversy to Massachusetts.

Rickey Land, etc., Co. *vs.* Miller, 218 U. S., 258.
Prout *vs.* Starr, 188 U. S., 537.
Orton *vs.* Smith, 18 Howard, 263.
Pennell *vs.* Roy, 3 De G. M. & G., 126.
Mead *vs.* Merritt, 2 Paige, 402.
Carson *vs.* Dunham, 149 Mass., 52; S. C., 3 L. R. A., 203.
Royal League *vs.* Kavanagh, 233 Ill., 175.
Bigelow *vs.* Old Dominion Copper Co., 74 N. J. Eq., 457.

It is thus apparent at the outset that the appellants' bill was still-born, being devoid of a spark of equity to give it life, and its prosecution could have been enjoined by the Florida court.

Rickey Land., etc., Co. *vs.* Miller, 218 U. S., 258.

II.

Perversion of Principles.

It has already been pointed out in the brief on the motion that the bill was sought to be maintained in violation of at least two Federal statutes, and we shall not add to the argument on these points, but deal rather with the perversion of principles on which the argument for its support rests. In a nutshell the idea of the bill is that the complainants in the Florida suit are not *proper parties* to litigate with the defendants there, because they do not possess the status of trustees of the bankrupt claimed by them, and that the equity court in Massachusetts can so determine, notwithstanding the Florida courts have held that an equity court cannot inquire into these matters. Thus regarded, the bill in Massachusetts savors a good deal of a tempest in a teapot, for it asks the court there to pass upon a mere question of the proper parties to the Florida suit, although insisting the complainants in the Massachusetts bill are bound to win in the Florida suit on the merits of the controversy, whoever are parties to the bill there; and it does seem like trifling to ask the court in Massachusetts to spend its time in settling a question of no moment. Laying aside, however, this consideration, the bill necessarily depends upon an assertion of the proposition that a court of equity can review the proceedings of a court of bankruptcy, so far as they by adjudication establish the *status* of the bankrupt as a bankrupt, and create trustees to represent the bankrupt. As already pointed out in the former brief, section 21*e* of the bankruptcy act was designed to emphasize the contrary, but it is said that if section 21*e* was so intended it is unconstitutional. Under its constitutional authority to enact a bankruptcy act Congress certainly had the power to give to judgments of the bankruptcy court the same effect ordinarily accorded to all judgments, which are "conclusive evidence" of the point adjudicated, and it could even make the judgments of the

bankruptcy court, as it could of other courts, conclusive evidence of jurisdiction.

Ex parte City Bank, 3 Howard, text 317-318.

There are many decisions on the point which have uniformly given effect to the provision.

Ex parte Learoyd, *re* Foulds, 10 Ch. D., 3.
Ex parte French, *re* Trim, 52 L. J. Ch., 48.
Revell *vs.* Blake, L. R., 7 C. P., 308.
Hersey *vs.* Jones, 128 Mass., 473.
Wheelock *vs.* Hastings, 4 Met., 504.
Palmer *vs.* Jordan, 163 Mass., 350.
Howes *vs.* Burt, 130 Mass., 368.
Barstow *vs.* Adams, 2 Day, 70.
Rogers *vs.* Stevenson, 16 Minn., 68.
Dambmann *vs.* White, 48 Cal., 439.
Wooldridge *vs.* Rickert, 33 La. Ann., 234.
Cone *vs.* Purcell, 56 N. Y., 649.
Wilson *vs.* Taylor, 70 S. E., 286.

It is certainly true that Congress has conferred neither original nor reviewing jurisdiction in bankruptcy upon courts of equity. It is said that if section 21*e* has the effect contended for it will tear up by the roots the valuable and time-honored principle that when a claim is based upon the decree of another court inquiry can always be made into the jurisdiction of the court to render it. The principle relied upon in this contention is correct, but it is misunderstood by the appellants. Suppose, for the sake of illustration, that this court should reverse the Circuit Court of Appeals and District Court in this case, and decree that appellants were entitled to the relief prayed, could the courts of Florida inquire whether or not the decree of the Circuit Court of Appeals was final, and this court was without jurisdiction of the appeal therefrom? They could not, because this court is the final authority, with power to decide as to its jurisdiction. Similarly, it has often been decided that a judgment

rendered by a Federal court cannot be collaterally impeached where there is a failure to show jurisdiction by the pleadings, or even by averring the falsity of the facts alleged to show diverse citizenship where that is alleged as the ground of jurisdiction.

Riverdale Mills *vs.* Alabama, etc., Co., 198 U. S., 188.

Chase *vs.* Wetzlar, 225 U. S., text 86.

The true rule is that the judgment of a court of general jurisdiction, with power to decide on its jurisdiction, and which does decide on it, cannot be collaterally impeached in any other court, but only reversed or set aside by a court, if there be one, authorized to review it. In other words, the judgment of the final authority is conclusive in every case, and in respect to bankruptcy matters the sole and final authority is the bankruptcy court itself, subject to the very limited provisions for review prescribed by the bankruptcy act.

There is in reality, however, no question presented by the bill as to the jurisdiction of the bankruptcy court. The bankruptcy act made the District Court of Massachusetts a court of bankruptcy. The bankrupt is alleged to be a Massachusetts corporation. A petition is alleged to have been filed to secure its adjudication. The bankrupt, after adjudication, filed schedules of its property, and is alleged through its officers to have acquiesced in and promoted the proceedings. Jurisdiction, therefore, was undoubted.

In re First Nat. Bank, 152 Fed., 54.

III.

Alleged Frauds.

That the bankrupt company, through its directors, could have passed a resolution admitting in writing its inability to pay its debts and its willingness to be adjudged a bankrupt

on that ground, or have made a general assignment for the benefit of creditors, either of which were acts of bankruptcy, cannot be denied, and the entire burden of the bill amounts to nothing more than that a wrong method was followed to secure the adjudication, involving some carelessness in pleading and averments, which are sought to be magnified into stupendous frauds by characterizations usually based upon an erroneous legal predicate. Again, there is a tempest in a teapot, sought to be created nearly seven years after the adjudication, although the adjudication is not complained of by the bankrupt, and it could in no manner whatsoever prejudicially affect the rights of the appellants, as the trustees merely took whatever interest the bankrupt had in its property. Had any one objected to the adjudication at the time, proceedings could have been taken to secure an adjudication as to which no question could be raised, and it is not improper to quote their own language and style the attempt of appellants to now impeach the decree on garbled statements of law and fact as "pestiferous." Nor do we see how it can be an evil or unconscionable purpose for officers of a corporation in embarrassed circumstances to seek to have its assets administered for the benefit of all concerned through the medium of the bankruptcy court. But, apart from that, Hull could not complain of any alleged fraud in the adjudication, for it did not affect his rights in any manner, shape or form.

23 Cyc., 1068.
1 Black on Judgments, sec. 294 *et seq.*
Safe Deposit Co. *vs.* Wright, 105 Fed., 155.
Smith *vs.* Elliott, 56 Fla., 849.
Wilcher *vs.* Robertson, 78 Va., 602.

Nor was a court of equity the proper forum.
Simmons *vs.* Saul, 138 U. S., 439.

The sole reason for the present attempt lies in the fact that *after the adjudication* Hull sought by an ejectment suit

in Florida to withdraw the property of which the bankrupt was in possession from the control of the bankruptcy court, and the Supreme Court of Florida decided he could not thus bind the trustee in bankruptcy, not a party to the suit.

Hull *vs.* Burr, 61 Fla., 625.

The only claim, therefore, of any prejudice to the appellants through the bankruptcy proceedings arises from the fact that after the adjudication *they* sought to disturb the *status* of the property by the ejectment suit, and, according to the decision of the Florida court, were unsuccessful in so doing. In short, they were defrauded because they were disappointed in a scheme to withdraw the property from the effect of the adjudication as preserving the *status quo* for the benefit of all concerned. If, as contended by them, the Supreme Court of Florida was wrong in holding that the judgment in ejectment did not conclude the trustee, then appellants have no cause to allege that they were in any manner affected by the bankruptcy proceedings, and are thus precluded, on their own theory, from questioning them.

Judgment in Ejectment.

We feel warranted in adding a little to what is said in the former brief as to the judgment in ejectment, and in this connection it is necessary to bear in mind exactly what the record shows, in view of contentions now made by appellants which are not supported by the record.

The bill was amended so as to make a transcript of the record in the ejectment suit a part thereof (Transcript, p. 21). The bill, therefore, must be construed in connection with that record, which shows that the suit was brought on November 28, 1905; that the summons was served on December 6, 1905, on N. B. Childs, made a co-defendant with the bankrupt, "as the person having the property herein described *in his possession*, and as the agent of the Port Tampa Phosphate Company." The declaration, filed on the same

day the suit was instituted, likewise alleged the defendants to be in possession of the premises. It also contained the following allegation:

> "And the defendants have received the profits of the said lands since the 9th day of October, A. D. 1905, of a yearly value of ten thousand dollars, and refuse to deliver possession of the said lands to the plaintiff or to pay the profits thereof. And plaintiff claims possession and damages to the amount of $1,000.00."
>
> Transcript, p. 24.

It is further shown by the transcript (p. 25) that the judgment was recovered by default, and awarded Hull, the plaintiff, the right to recover possession of the premises, and this judgment was rendered March 13, 1906 (p. 26).

It is not true, therefore, as asserted in appellants' original brief at page 39, that the demurrer admits the bankrupt had not been in possession of the premises since May, 1905. There is no such allegation in the bill, which alleges that Hull, "*soon* after the delivery to him" of a deed, took possession of the property. It is hard to find a more indefinite word in the English language than "soon" (see Psalm, 99, v. 4; "As You Like It," act 3, sec. 2, Rosalind to Orlando), and the bill must be taken to admit the bankrupt's possession at the time of the adjudication and the appointment of a trustee, and up to the recovery of the judgment in ejectment, unless that proceeding was a mere "paper form." A pleading is to be construed most strongly against the pleader on the presumption that he states his case as favorably for himself, as the facts will admit, and the peculiar allegations of the bill in regard to Hull's title are not even inconsistent with the existence of such an equitable interest of the bankrupt as is disclosed by the report of the case on the first appeal to the Supreme Court of Florida.

Hull *vs.* Burr, 58 Fla., 432.

There is nowhere in the bill any allegation that the bankrupt possessed no equitable interest in the property, or that

the trustees possessed none, and its whole theory is that lawful trustees could assert some rights in the property. At any rate, the bill distinctly admits that prior to the institution of the ejectment suit creditors of the bankrupt were asserting it owned an interest in the property and that the trustees are asserting such interest in the Florida suit. And it must be taken as admitting the bankrupt's possession at the time of filing the petition and at the time of the adjudication and appointment of a trustee, for why, otherwise was the ejectment suit brought and prosecuted to judgment? It is in view of these facts that the effect of the judgment must be determined. It is perfectly plain, also, that the Florida court was right in holding this judgment could not bind the trustee, and it did not disregard, as asserted by appellants at page 40 of their brief, but applied the principle of Eyster *vs.* Gaff and Burbank *vs.* Bigelow, decided by this court. The principle there applied is the same as was applied in Orton *vs.* Smith, 18 Howard, 263, denying the right to file such a bill as the present, *viz.*, that pending proceedings in a court of competent jurisdiction are not to be arrested by subsequent proceedings in another court; or, in other words, where jurisdiction has attached in a competent court, that court has the right, under all ordinary circumstances, to proceed, irrespective of proceedings subsequently begun in another court.

See opinion of Justice Miller, Bracken *vs.* Johnson, Fed. Cases, No. 1761.

The underlying principle of these cases forbade the bill of appellants, which, *without any intervening equity,* undertook to devest the prior jurisdiction of the Florida court.

In the last place it may be said that the record of the ejectment suit entirely fails to show any service upon the Port Tampa Company. It shows service upon one N. B. Childs as the individual having the property in his possession *"and as the agent* of the Port Tampa Phosphate Company." The law of Florida permits service upon foreign corporations by serving a business agent resident in the county in which suit

is brought or an agent transacting business for them in this State, *in the absence from the State* of all directors and executive officers. The return fails to show jurisdiction of the bankrupt, in order to make the judgment effectual against it.

Seacoast Lumber Co. *vs.* Camp Lumber Co., 63 Fla., 604.

We shall not dwell further on the effect of the judgment, for the reason that it can in no way be material, unless the District Court in Massachusetts could have retained the bill as a bill to quiet title, as contended in the Circuit Court of Appeals—an untenable contention.

Orton *vs.* Smith, 18 Howard, 263.

Rickey Land, etc., Co. *vs.* Miller, 218 U. S., 258.

Besides, the allegations of the bill clearly show it never was intended as a bill to quiet title, because it wholly fails to set forth the interest or claim against which it is sought the complainants should be quieted, although the claim is the basis of the litigation in Florida. And it is perfectly plain that, even if jurisdiction to quiet title to the Florida property existed in the District Court of Massachusetts, in the absence of prior proceedings in the Florida court, there was no thought that the bill was intended for that purpose, nor did it contain the appropriate and necessary allegations.

Sanford *vs.* Cloud, 17 Fla., 557.

Houston *vs.* McKinney, 54 Fla., 600.

Other Erroneous Contentions.

It is contended by the 26th paragraph of the bill that a single creditor attending a meeting cannot act in respect to the election of new trustees. The contrary is true.

Re Thomas, *Ex parte* Warner, 1911 Sol. Journ., 482.

In any event there can be no collaterial attack.

Simpson *vs.* Gonzalez, 15 Fla., 9.

Hart *vs.* Bostwick, 14 Fla., 162.

Hull *vs.* Burr, 64 Fla., 83.

It is contended in appellants' brief, on page 28, that Manson *vs.* Williams, 213 U. S., 453, in the portion of the opinion quoted there, is an authority in their favor and against the appellees, while the very quotation itself, as plainly as language can express it, states that an adjudication in bankruptcy establishes the status of bankruptcy as against the world, though not the facts upon which it was founded, except as against parties entitled to be heard.

See

Revell *vs.* Blake, L. R., 7 C. P., 308.
Silvey *vs.* Tift, 123 Ga., 804.
Tilt *vs.* Kelsey, 207 U. S., 43.
I Remington on Bankruptcy, sec. 444 *et seq.*

And it is characteristic of their brief that they entirely misconceive the proper application of authorities cited, and fail to distinguish want of jurisdiction from errors or irregularities committed in the exercise of jurisdiction.

U. S. *vs.* Morse, 218 U. S., 493.
Cooper *vs.* Reynolds, 10 Wall., 308.
Ill. C. R. Co. *vs.* Adams, 180 U. S., text 34.
Noble *vs.* Logging Co., 147 U. S., text 173.
Hughes *vs.* Cuming, 58 N. E., 794.

Judicial Notice.

It is not contended by appellees that this court will take judicial notice of the facts presented on the former appeals to the Supreme Court of Florida. But it is contended that the court will take judicial notice of the laws of Florida, whether dependent upon statutes or judicial opinions.

Lamar *vs.* Micou, 114 U. S., 218.

To the extent, therefore, that any questions of Florida law are involved, and have been passed upon, such as the character of an ejectment suit in Florida and the question, if one of Florida law, whether the suit abated on the change

of trustees, the court will take judicial notice of the Florida decisions. We further contend that in properly construing the appellants' bill, where allegations are not direct, certain and positive and are to be construed against the pleader, the court can look to the Florida decisions as illustrating a state of facts that may exist consistently with the allegations of the bill, just as it could suppose any state of facts consistent with the allegations of the bill. It can further look to judicial opinions in Florida as to the effect of a decision on appeal from an interlocutory decree. And it can also look to the Florida decisions as establishing a rule that the adjudication and procedings of the bankruptcy court are not subject to collateral attack in the courts of Florida, as that is a point the Florida courts could finally settle *against*, but not in favor of, appellants.

Abbott *vs.* National Bank, 175 U. S., 409.

There is no possible merit in appellants' bill, regarded from any standpoint, and the decrees of the courts below must be affirmed if jurisdiction of this appeal is maintained.

Respectfully submitted,

FRANK L. SIMPSON,
E. R. GUNBY,
JAMES F. GLEN,
Counsel for Appellees.